

# EXHIBIT B

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LADRON DURIO, AND JAMES MOORE  
9

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 COUNTY OF SAN FRANCISCO  
12 UNLIMITED JURISDICTION

13 GLADYS DEWITT,

14 Plaintiff,

15 vs.

16 CITY AND COUNTY OF SAN  
FRANCISCO, SAN FRANCISCO  
17 GENERAL HOSPITAL, LADRON  
DURIO, JAMES MOORE, and DOES 1 -  
18 25,

19 Defendants.  
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Case No. 459-735

**DEFENDANT CITY AND COUNTY OF  
SAN FRANCISCO'S NOTICE OF  
DEMURRER TO PLAINTIFF'S  
COMPLAINT; DEMURRER**

Hearing Date: April 4, 2007  
Hearing Judge: Hon. Peter J. Busch  
Time: 9:30 a.m.  
Place: Dept. 301

Date Action Filed: January 19, 2007  
Trial Date: Not yet set

## NOTICE OF DEMURRER

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that defendants City and County of San Francisco's ("City")<sup>1</sup> and Ladron Durio's demurrer to plaintiff's five causes of action in her complaint, served and filed with this notice, has been set for hearing on April 4, 2007 at 9:30 a.m. in Department 301, or as soon as the matter may be heard in the above-referenced court, which is located at 400 McAllister Street, San Francisco. The demurrer shall be based on the grounds that plaintiff failed to file a timely government claim, and that plaintiff's five causes of action do not state facts sufficient to state a cause of action and are barred as a matter of law. The demurrer shall be based on all pleadings and records on file with the Court in this matter and on all such other oral and documentary evidence as the Court may consider in the hearing on this motion.

Dated: 2/28/07

DENNIS J. HERRERA  
City Attorney  
ELIZABETH S. SALVESON  
Chief Labor Attorney  
ROSE-ELLEN H. FAIRGRIEVE  
Deputy City Attorney

By: 

ROSE-ELLEN H. FAIRGRIEVE

Attorneys for Defendants  
CITY AND COUNTY OF SAN FRANCISCO,  
LADRON DURIO AND JAMES MOORE

<sup>1</sup> San Francisco General Hospital is not a separate legal entity from the City and County of San Francisco, but rather a City department. Thus, it cannot be sued separate and apart from the City, and makes no appearance in this action. See *Darby v. Pasadena Police Dept.* (5<sup>th</sup> Cir. 1991) 939 F.2<sup>nd</sup> 311, 313-14 [departments within a municipal corporation cannot be sued unless a statute or ordinance specifically vests the department with the power to sue or be sued].) Under the San Francisco Charter, only the City has the power to sue or be sued. (See San Francisco Charter, § 1.101.)

The complaint has not been served on defendant James Moore, and thus he makes no appearance in this case.

## DEMURRER

Pursuant to Code of Civil Procedure section 430.10, subdivision, the City demurs to the complaint filed by plaintiff Gladys DeWitt on January 19, 2007. The demurrer is based on each of the following grounds:

Demurrer to First, Second, Third, Fourth and Fifth Causes of Action

The first, second, third, fourth, and fifth causes of action fail because plaintiff failed to file a timely government claim, as required by the Tort Claims Act.

Demurrer to First Cause of Action (Breach of Contract)

The first cause of action for breach of contract fails because as a matter of law no contract exists.

Demurrer to Second Cause of Action (Breach of Implied Covenant of Good Faith and Fair Dealing)

The second cause of action for breach of implied covenant of good faith and fair dealing fails because as a matter of law no contract exists.

Demurrer to Third Cause of Action (Fraud)

The third cause of action for fraud fails because the City is immune from liability for misrepresentation under California Government Code §818.8.

Demurrer to Fourth Cause of Action (Intentional Infliction of Emotional Distress)

The fourth cause of action for intentional infliction of emotional distress fails because it is barred by Workers' Compensation Act exclusivity.

Demurrer to Fifth Cause of Action (Negligent Infliction of Emotional Distress)

The fifth cause of action for negligent infliction of emotional distress fails because it is barred by Workers' Compensation Act exclusivity.

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1 Demurrer to Complaint as Against Defendant San Francisco General Hospital

2 The entire complaint fails as alleged against San Francisco General Hospital, because the  
3 hospital is not a separate legal entity that can be sued.

4 Dated: 2/28/07

DENNIS J. HERRERA  
City Attorney  
ELIZABETH S. SALVESON  
Chief Labor Attorney  
ROSE-ELLEN H. FAIRGRIEVE  
Deputy City Attorney

8  
9 By:   
10 ROSE-ELLEN H. FAIRGRIEVE  
11 Attorneys for Defendant  
12 CITY AND COUNTY OF SAN FRANCISCO,  
13 LADRON DURIO AND JAMES MOORE  
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PROOF OF SERVICE

I, JUDY PERRY, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Fifth Floor, San Francisco, CA 94102.

On February 28, 2007, I served the following document(s):

- **DEFENDANT CITY AND COUNTY OF SAN FRANCISCO'S NOTICE OF DEMURRER; DEMURRER**
- **MEMORANDUM OF POINTS AND AUTHORITIES ISO DEMURRER**

on the following persons at the locations specified:

Ashwin Ladva, Esq.  
Ladva, Shoker & Associates  
530 Jackson St., 2<sup>nd</sup> Floor  
San Francisco, CA 94133-5143

in the manner indicated below:

☒ **BY UNITED STATES MAIL:** Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

☐ **BY PERSONAL SERVICE:** I sealed true and correct copies of the above documents in addressed envelope(s) and caused such envelope(s) to be delivered by hand at the above locations by a professional messenger service. A declaration from the messenger who made the delivery ☐ is attached or ☐ will be filed separately with the court.

☐ **BY OVERNIGHT DELIVERY:** I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and delivery by overnight courier service. I am readily familiar with the practices of the San Francisco City Attorney's Office for sending overnight deliveries. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be collected by a courier the same day.

☐ **BY FACSIMILE:** Based on a written agreement of the parties to accept service by fax, I transmitted true and correct copies of the above document(s) via a facsimile machine at telephone number Fax #' to the persons and the fax numbers listed above. The fax transmission was reported as complete and without error. The transmission report ☐ is attached or ☐ will be filed separately with the court.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed February 28, 2007, at San Francisco, California.

  
JUDY PERRY

1 DENNIS J. HERRERA, State Bar #139669  
 City Attorney  
 2 ELIZABETH S. SALVESON, State Bar #83788  
 Chief Labor Attorney  
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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
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13 GLADYS DEWITT,

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15 vs.

16 CITY AND COUNTY OF SAN  
 FRANCISCO, SAN FRANCISCO  
 17 GENERAL HOSPITAL, LADRON  
 DURIO, JAMES MOORE, and DOES 1 -  
 18 25,

19 Defendants.  
 20  
 21

Case No. 459-735

**MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT OF  
 DEMURRER TO PLAINTIFF'S  
 COMPLAINT FOR DAMAGES**

Hearing Date: April 4, 2007  
 Hearing Judge: Hon. Peter J. Busch  
 Time: 9:30 a.m.  
 Place: Dept. 301

Date Action Filed: January 19, 2007  
 Trial Date: Not yet set

Attached Documents: None

22  
 23 **INTRODUCTION**

24 Plaintiff Gladys DeWitt's complaint arises out of her employment with the City and County  
 25 of San Francisco. DeWitt sues the City for: 1) breach of contract; 2) breach of implied covenant of  
 26 good faith and fair dealing; 3) fraud; 4) intentional infliction of emotional distress, and 5) negligent  
 27 infliction of emotional distress. The demurrer should be sustained without leave to amend as to  
 28



DeWitt's entire complaint because DeWitt failed to file a timely government claim. Furthermore, the causes of action for breach of contract, breach of implied covenant of good faith and fair dealing, and fraud are barred as a matter of law, and her intentional and negligent infliction of emotional distress claims are barred by Workers' Compensation exclusivity.

### PROCEDURAL HISTORY

On March 20, 2006, DeWitt filed a tort claim with the City, alleging, among other things, that she was removed from her job in January 2001, and has not received a new job. The City denied her claim on September 28, 2006. DeWitt filed the instant Complaint on January 19, 2007. DeWitt served the City on January 29, 2007. DeWitt served Defendant Durio on February 11, 2007. DeWitt has not served Defendant James Moore.

### STATEMENT OF FACTS

DeWitt worked as a Healthcare Worker II at San Francisco General Hospital from 1993 to 2002. (Complaint ¶12.) Defendant James Moore was DeWitt's supervisor during that time.<sup>1</sup> (Complaint ¶6.) Defendant Ladron Durio was DeWitt's co-worker. (Complaint ¶7.)

DeWitt broadly alleges unfair treatment by the City, Moore, and Durio in regard to her disability issues and her disciplinary matter. According to the Complaint, DeWitt suffered a back injury on November 1, 2001, and was temporarily totally disabled. (Complaint ¶¶15, 17.) In September 2002, DeWitt alleges she informed the City that she was able to return to work. (Complaint ¶20.) Between January 2003 and March 2003, DeWitt claims she communicated with the City regarding reasonable accommodations and her return to work. (Complaint ¶¶30-36.)

In regard to her performance issues, DeWitt alleges that she was served with a Notice of Intent to Dismiss from Permanent Position on November 29, 2001. (Complaint ¶16.) On December 27, 2001, DeWitt alleges she met with Defendant Moore to discuss the incidents that were the subject of the Notice of Intent to Dismiss, and that she informed Moore that Defendant Durio was making up charges against her in order to have her terminated. (Complaint ¶17.)

<sup>1</sup> Although James Moore is named as a defendant in the Complaint, he has not been served, and thus makes no appearance in this case.



Plaintiff alleges that on November 18, 2002, the City served DeWitt with an amended Notice of Intent to Dismiss from Permanent Position. (Complaint ¶21.) Plaintiff claims that the amended Notice was based on allegations made by Durio and Moore. (*Id.*) On December 18, 2002, a hearing on the amended Notice of Intent to Dismiss was conducted. DeWitt alleges that she was exonerated, and the City was ordered to reinstate her. (Complaint ¶26.)

DeWitt has not returned to work. (Complaint ¶39.)

## LEGAL ANALYSIS

### I. STANDARD FOR DEMURRER

A demurrer is treated "as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) A plaintiff bears the burden of showing a reasonable possibility that any defects in a complaint could be cured by amendment. (*Id.*) Where, as here, "there is no liability as a matter of law, leave to amend should not be granted." (*Schonfeldt v. State of California* (1998) 61 Cal.App.4th 1462, 1465.)

### II. DEWITT'S COMPLAINT IS BARRED BY HER FAILURE TO FILE A TIMELY GOVERNMENT TORT CLAIM.

DeWitt's complaint is barred because she did not file a timely government claim to the City before filing her lawsuit, as required by the California Tort Claims Act. (See Gov't Code §§ 905, 911.2.)

Under the Tort Claims Act, claims for money damages against a California public entity and its employees must be submitted in writing to the public entity before a lawsuit may be filed. (*State of California v. Superior Court of Kings County (Patricia Bodde, Real Party In Interest)* (2004) 32 Cal. 4th 1234, 1243 (2004) ("*Bodde*"); *Santee v. Santa Clara County Office of Educ.* (1990) 220 Cal.App.3d 702, 708.) The timely filing of a proper claim is a mandatory condition precedent to the maintenance of an action against a public entity. (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 454, ("Compliance is mandatory and failure to file a claim is fatal to the cause of action.")) A plaintiff must file a California tort claim within six months or, in the event of late claim relief, within one year of the date the injury incurred as a result of defendant's wrongful act or

omission. (Govt. Code §911.2, § 911.4.) A plaintiff must plead "facts demonstrating or excusing compliance with the claim presentation requirement," in his or her complaint. *Bodde*, 32 Cal. 4th at 1243.

The phrase "money or damages" as used in the Claims Act is "comprehensive in scope and includes tort claims arising out of negligence, nuisance, breach of statutory duties, and intentional wrongs. Actions for breach of contract also fall within the scope of claims for 'money or damages.'" (*Loehr v. Ventura County Community College Dist.*, 147 Cal.App.3d 1071, 1079 (1983) (Citations omitted).) "A suit for 'money or damages' includes all actions where plaintiff is seeking monetary relief, regardless whether the action is founded in tort, contract or some other theory." (*Hart v. County of Alameda* (1999) 76 Cal.App.4th 766, 778.) (Inner quotations omitted;) see also *Alliance Fin. v. City and County of San Francisco* (1998) 64 Cal.App.4th 635, 641 (... "actions on a contract are indeed actions for 'money or damages' under the [tort claims] act;") *Baines Pickwick Ltd v. City of Los Angeles* (1999) 72 Cal.App.4th 298, 307.))

In light of these requirements, DeWitt is barred from relief for any acts that occurred prior to September 20, 2005, which is six months before she filed her claim. All five of DeWitt's causes of action arise from acts that are alleged to have occurred well before that date. In fact, the most recent date of any alleged act by any of the defendants is March 29, 2003, when Defendant Moore allegedly called De Witt and told her a position was not available and he could not accommodate her. (Complaint ¶36.) Accordingly, the demurrer to DeWitt's complaint should be sustained for failure to comply with the Tort Claims Act.

**III. THE DEMURRER TO THE BREACH OF CONTRACT CLAIM (FIRST CAUSE OF ACTION) AND BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING CLAIM (SECOND CAUSE OF ACTION) SHOULD BE SUSTAINED WITHOUT LEAVE TO AMEND BECAUSE PUBLIC EMPLOYMENT IS SET BY STATUTE AND NOT CONTRACT.**

DeWitt contends that the City entered into an oral agreement with her to reinstate her and to provide her with reasonable accommodations. (Complaint ¶42.) She alleges that the City breached this agreement by failing to reinstate her and failing to provide her with reasonable accommodations. (Complaint ¶45.) However, DeWitt's claims must fail because a public employee cannot maintain a contract claim against a public employer. The California Supreme Court has

1 consistently held that the terms and conditions of civil service employment are set by statute, not by  
2 contract. Thus, as a matter of law, DeWitt cannot assert purported "contract" claims against the  
3 City.

4 In *Miller v. State of California* (1977) 18 Cal.3d 808, 813-814, the California Supreme  
5 Court dismissed a civil servant's breach of contract claim, stating that "it is well settled in California  
6 public employment is not held by contract but by statute", that "the terms and conditions of civil  
7 service employment are fixed by statute and not by contract" and "[t]he statutory provisions  
8 controlling the terms and conditions of civil service employment cannot be circumvented by  
9 purported contracts in conflict therewith."

10 The California Supreme Court later affirmed this principle in *Shoemaker v. Myers* (1990) 52  
11 Cal.3d 1, 23. The *Shoemaker* Court sustained the employer's demurrer to the breach of contract and  
12 implied covenant of good faith and fair dealing claims, holding that "because plaintiff is a civil  
13 service employee, he cannot state such a cause of action." (*Id.*)

14 The California Court of Appeal has consistently followed this Supreme Court precedent.  
15 (*See Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 1432-35 (county employee's  
16 breach of contract and implied covenant claims are barred because a public servant may not as a  
17 matter of law assert contract or quasi-contract claims); *Hill v. City of Long Beach*, 33 Cal.App.4th  
18 1684, 1690-91, 40 Cal.Rptr.2d 125, 127-28, *review denied* (1995) (city employee's contract and  
19 breach of implied covenant claims are barred as a matter of law because public employment is  
20 governed by statute, not contract); *Williams v. Dept. of Water & Power*, 130 Cal.App.3d 677, 680  
21 (1982) ("the terms and conditions of public employment, including term of service, are fixed by the  
22 statute, rules or regulations creating it, not by contract.") (citations omitted); *Vielehr v. State of*  
23 *California* (1980) 104 Cal.App.3d 392, 396, *cert. denied*, 449 U.S. 953 (statutory terms and  
24 conditions of public employment cannot be circumvented by purported contracts.))

25 It is undisputed that DeWitt is an employee of the City and County of San Francisco.  
26 (Complaint ¶12.) Accordingly, the demurrer to DeWitt's breach of contract and breach of implied  
27 covenant of good faith and fair dealing causes of action (first and second, respectively) should be  
28 sustained without leave to amend.

1  
2 **IV. THE DEMURRER TO THE FRAUD CLAIM (THIRD CAUSE OF ACTION)**  
3 **SHOULD BE SUSTAINED WITHOUT LEAVE TO AMEND BECAUSE THE CITY**  
4 **HAS ABSOLUTE IMMUNITY FOR ANY ALLEGED MISREPRESENTATIONS.**

5 DeWitt alleges fraud against the City and James Moore, claiming that they "falsely and  
6 fraudulently represented to DeWitt that they would honor the agreement [referenced in the First  
7 Cause of Action, to provide her with reasonable accommodations.]" (Complaint ¶52.) Because the  
8 City has immunity for all types of alleged misrepresentations, the demurrer to this cause of action  
9 must be sustained.

10 Public entities are immune from liability "caused by misrepresentation by an employee of  
11 the public entity, whether or not such representation be negligent or intentional." (Gov't Code  
12 §818.8.) The immunities set forth in Government Code Section 818.8 apply in cases where  
13 financial interests are at stake. (*Johnson v. State of California* (1968) 69 Cal.2d 782, 800.) Where  
14 the public entity is alleged to have engaged in willful misrepresentation regarding the terms of  
15 employment, financial interests are at stake. (*Burden v. County of Santa Clara* (2000) 81  
16 Cal.App.4<sup>th</sup> 244, 250.)

17 DeWitt alleges that the City and Defendant Moore promised to reinstate her and provide her  
18 with reasonable accommodation, but that they did not intend to honor the agreement to do so.  
19 (Complaint ¶¶52-53.) Since DeWitt's claim relates to the terms of her employment, the City has  
20 absolute immunity with respect to this claim as a matter of law. Accordingly, the Court should  
21 sustain the demurrer as to the fraud cause of action without leave to amend.

22 **V. THE DEMURRER TO THE INTENTIONAL INFLICTION OF EMOTIONAL**  
23 **DISTRESS CLAIM (FOURTH CAUSE OF ACTION) AND NEGLIGENT**  
24 **INFLICTION OF EMOTIONAL DISTRESS CLAIM (FIFTH CAUSE OF ACTION)**  
25 **SHOULD BE SUSTAINED WITHOUT LEAVE TO AMEND BECAUSE THE**  
26 **CLAIMS ARE PRECLUDED BY THE WORKERS' COMPENSATION ACT.**

27 **A. THE WORKERS' COMPENSATION ACT BARS DEWITT'S**  
28 **INTENTIONAL AND NEGLIGENT INFLICTION OF EMOTIONAL**  
**DISTRESS CLAIMS.**

Generally, an employee whose injury arises out of and in the course of employment is  
limited to recovery of workers' compensation benefits. (Labor Code §§ 3600-3602.) "Section 3600

of the Labor Code provides that an employer is liable for injuries to its employees arising out of and in the course of employment, and section [3602] declares that where the conditions of workers' compensation exist, the right to recover such compensation is the exclusive remedy against an employer for injury or death of an employee." (*Vuillemainroy v. American Rock & Asphalt, Inc.* (1<sup>st</sup> Dist. 1999) 70 Cal.App.4<sup>th</sup> 1280, 1283.) These provisions apply to all injuries that arise from the employment relationship. (*Livitsanos v. Superior Court* (1992) 2 Cal.4<sup>th</sup> 744, 747.) Where, as here, "the complaint affirmatively alleges facts indicating coverage by the workers' compensation laws, if it fails to state additional facts negating application of the exclusive remedy provision, no civil action will lie and the complaint is subject to a general demurrer." (*Halliman v. Los Angeles Unified School Dist.* (1984) 163 Cal.App.3d 46, 50.)

California has a "tripartite system for classifying injuries arising in the course of employment." (*Vuillemainroy*, 70 Cal.App.4<sup>th</sup> at 1284, quoting *Fermino v. Fedco, Inc.* (1994) 7 Cal.4<sup>th</sup> 701, 714-715, additional internal citations and quotations omitted.) First, "there are injuries caused by employer negligence," which are subject to the Act's exclusivity. (*Id.*) Second, "there are injuries caused by ordinary employer conduct that intentionally, knowingly, or recklessly harms an employee," which are also subject to the Act's exclusivity. (*Id.*) Third, there are injuries caused by "certain types of intentional employer conduct" that "could not be considered a normal risk of employment or is contrary to fundamental public policy." (*Id.*) Only this third category of injuries is exempt from the Act's exclusivity. (*Id.*)

**1. The Workers' Compensation Act's exclusivity applies to DeWitt's Intentional Infliction of Emotional Distress claim.**

The Act's exclusivity applies to claims that an employer has inflicted emotional distress on an employee where the employee alleges an injury that arises in the course of the employment. (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 15-16.) Acts that have been deemed to arise within the course of employment include personnel actions such as "demotion, transfer, discipline, and even the employer's attempt to force the employee into involuntary retirement." (*Id.* at 18.) Exclusivity applies to preclude employees from bringing emotional distress claims against their employers even when an employee alleges that an employer's conduct was "manifestly unfair, outrageous,



harassment, or intended to cause emotional distress.” (*Cole v. Fair Oaks Fire Protection District* (1987) 43 Cal.3d 148, 159.)

DeWitt’s claim for intentional infliction of emotional distress fails because she does not allege any facts negating application of the exclusive remedy provision. (See *Halliman v. Los Angeles Unified School Dist.*, 163 Cal.App.3d at 50.) DeWitt’s claim is predicated on alleged personnel actions, specifically the City’s and Moore’s “failure to act in reinstating DeWitt to her job.” (Complaint ¶ 60.) These acts fit squarely within those types of actions discussed in *Cole*, *supra*, which are deemed to be within the scope of employment. Accordingly, the demurrer to DeWitt’s fourth cause of action should be sustained.

## 2. The WCA’s exclusivity applies to DeWitt’s Negligent Infliction of Emotional Distress claim

The Act also bars DeWitt’s negligent infliction of emotional distress claim because claims based on an employer’s negligent conduct fall within *Fermino*’s first category of claims, which are covered by the Act’s exclusivity rule. (*Fermino*, 7 Cal. 4<sup>th</sup> at 713-714; *Vuillemainroy*, 70 Cal.App.4<sup>th</sup> at 1284.) “[B]oth the language and the legislative history of the Act make clear that the Legislature, in setting the terms of the compensation bargain, was focused on eliminating common law tort concepts of negligence.” (*Fermino*, 7 Cal.4th at 710; accord *Mathews v. Workmen’s Comp. Appeals Bd.* (1972) 6 Cal.3d 719, 728 (reviewing the Act’s legislative history and holding that the Act bars employees from bringing negligence claims against their employers).)

The Act “reflects the virtually unanimous rule throughout the nation that an injury is ‘accidental’ for the purposes of workers’ compensation unless it results from a conscious and deliberate intent directed to the purpose of inflicting an injury.” (*Soares v. City of Oakland* (1992) 9 Cal.App.4<sup>th</sup> 1822, 1827.) Negligently inflicted injuries are a normal “part of the hazards of the work environment.” (*Id.* at 1828, internal quotations omitted.) Precluding tort actions against employers for such accidental injuries is “consistent with the traditional policy of relying on workers’ compensation to cover ‘accidents’ on the job.” (*Id.*, internal quotations omitted.) Accordingly, DeWitt’s fifth cause of action is barred as a matter of law.

VI. THE DEMURRER SHOULD BE SUSTAINED AS TO DEFENDANT SAN FRANCISCO GENERAL HOSPITAL BECAUSE THE HOSPITAL IS NOT A LEGAL ENTITY.

DeWitt has sued San Francisco General Hospital in addition to the City. However, the Hospital is not a separate legal entity from the City and is therefore not a proper defendant. The San Francisco City Charter provides that the City and County may appear, sue and defend in all courts in all matters and proceedings. (San Francisco Charter § 1.101) Because the Hospital is not a separate legal entity, only the City can be sued in this action. *See* 17 McQuillin, *Municipal Corporations* § 49.16, at 249 (3rd ed.) ("usually actions by or against a municipal corporation should be in its corporate name, and not by or against the council"); *Sheehan v. Board of Police Commissioners*, 188 Cal. 525, 532 (1922) ("board has no separate existence and is incapable of either suing or being sued"); *see also Talbot v. City of Pasadena* (1938) 28 Cal.App.2d 271, 274; *Darby v. Pasadena Police Dept.* (5th Cir. 1991) 939 F.2d 311, 313 ("complaint which sued only the police department and not the City of Pasadena, was filed improperly against a nonexistent jural entity"). Accordingly, the demurrer as to San Francisco General Hospital should be sustained.

CONCLUSION

For the foregoing reasons, Defendants' demurrer to all causes of action should be granted without leave to amend.

Dated: 2/28/07

DENNIS J. HERRERA  
City Attorney  
ELIZABETH S. SALVESON  
Chief Labor Attorney  
ROSE-ELLEN H. FAIRGRIEVE  
Deputy City Attorney

By: 

ROSE-ELLEN H. FAIRGRIEVE

Attorneys for Defendants  
CITY AND COUNTY OF SAN FRANCISCO,  
LADRON DURIO, AND JAMES MOORE



# EXHIBIT C

endorse copy

**ENDORSED  
FILED**  
San Francisco County Superior Court

MAR 22 2007

BY: GORDON PARKER, CLERK  
WESLEY BARRIEZ  
Deputy Clerk

Ashwin Ladva, Esq. (SB# 206140)  
Palvir K. Shoker, Esq. (SB# 215533)  
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(415) 296-8844

Attorney for Plaintiffs,  
GLADYS DEWITT

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN FRANCISCO

GLADYS DEWITT,

Plaintiffs,

v.

CITY AND COUNTY OF SAN  
FRANCISCO, SAN FRANCISCO  
GENERAL HOSPITA, LADRON  
DURIO, JAMES MOORE and DOES 1 –  
10,

Defendants.

Case No.: CGC-07-459-735

**PLAINTIFF'S MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
OPPOSITION OF DEFENDANT  
CITY AND COUNTY OF SAN  
FRANCISCO'S DEMURRER TO  
PLAINTIFF'S COMPLAINT FOR  
DAMAGES**

Hearing Date: April 4, 2007  
Hearing Judge: Hon. Peter J. Busch  
Time: 9:30 a.m.  
Dept. 301

Date Action Filed: January 19, 2007  
Trial Date: Not Yet Set

**I. INTRODUCTION**

Defendant incorrectly states in the opening line of their introduction that Plaintiff's complaint arises out of her employment with San Francisco City and County (hereinafter "SFCC"). Plaintiff filed a complaint against the City for a breach of an agreement entered into between Defendant SFCC and Plaintiff.

1 As Plaintiff will make clear, Plaintiff complaint is not barred as Plaintiff filed a timely  
2 government claim, and Plaintiff's claims do not only involve the terms and conditions of her  
3 employment but also an independent contractual agreement reached between Plaintiff and SFCC. The  
4 claims for breach of contract, breach of implied covenant of good faith and fair dealing and fraud must  
5 be allowed to go forward as the SFCC has no immunity from contractual obligations.  
6

## 7 II. PROCEDURAL HISTORY

8 On March 20, 2006, Plaintiff properly filed and served a claim with SFCC stating that SFCC  
9 breached a contract with Plaintiff for its breach of a promise to provide Plaintiff with a new job per the  
10 agreement.<sup>1</sup> SFCC denied the claim of Plaintiff on September 28, 2006. Plaintiff filed the underlying  
11 complaint on January 19, 2007. Plaintiff attempted to serve the parties immediately. Plaintiff was  
12 successful in serving SFCC and James Durio respectively on January 19, 2007 and February 11, 2007.  
13 Defendant James Moore has been successful in his attempts to evade service.  
14

## 15 III. STATEMENT OF FACTS

16 The relevant facts of the complaint are set out below.

17 During her employment with San Francisco General Hospital, Plaintiff was a vocal critic of  
18 inadequate conditions for appropriate healthcare for patients and her fellow employees. (Para. 10)  
19 Plaintiff's supervisor, James Moore, provided copies of confidential information that was not to be  
20 disclosed to other employees, including copies of Plaintiff's performance evaluations, to Defendant  
21 Durio. (Para. 13)  
22

23 In September 2002, Plaintiff advised defendant SFGH that she was able to return to work after an  
24 excused absence and communicated her readiness and ability to supervisor James Moore. Moore  
25  
26

27  
28 <sup>1</sup> Plaintiff recently served SFCC with discovery in order to obtain copies of the agreement, the order from the Skelly hearing,  
as well as the minutes from the Skelly hearing.

1 advised Plaintiff that he was uncertain as to whether he could provide accommodation to Plaintiff given  
2 her medical disability. (Paras. 13 – 20). While Plaintiff waited to hear back from Moore as to whether  
3 she would be provided with a reasonable accommodation so that she could return to work, on November  
4 18, 2002, defendant SFCC served Plaintiff with an amended Notice of Intent to Dismiss from Permanent  
5 Position. (Para. 21)

6  
7 On or about December 10, 2002, Plaintiff obtained a medical report from her physician, Artur  
8 Swartz, MD. The report stated that her medical condition resolved and that she was able to return to all  
9 her major life activities, including work, without restriction. (Para. 23)

10  
11 On or about December 18, 2002, defendants SFCC and Moore proceeded with a Skelly hearing the  
12 purpose of which was to dismiss Plaintiff from her position for “inattention to duty.” During the course  
13 of that hearing, Plaintiff was completely exonerated from all charges based on her own testimony and  
14 the testimony of individual witnesses obtained by Plaintiff’s retained counsel. Defendant SFCC was  
15 ordered to reinstate Plaintiff. (Para. 26) From the date of the Skelly hearing to present, defendant SFCC  
16 has done nothing to reinstate Plaintiff to a position within SFCC. (Para. 28)

17  
18 In January 2003, Plaintiff began to make requests that Defendant SFGH provide her with reasonable  
19 accommodations so that she could return to work. (Para. 30) On March 28, 2003, within one hour of  
20 Plaintiff’s time to arrive at work, Ms. Ito telephoned Plaintiff and told her not to appear at work,  
21 withdrawing her invitation for Plaintiff to return to work as scheduled. Ms. Ito then informed Plaintiff  
22 that she would get back to her. (Para. 35) On March 29, 2003, Plaintiff’s supervisor Moore called her  
23 and stated that Ms. Ito made a mistake and the position was no longer available and he could not  
24 accommodate her. Defendant James Moore then promised to get back to Plaintiff at a later date.  
25 Defendant Moore never contacted Plaintiff again. (Para. 36)

1 Since recovery from her back injury and the completion of her training, Defendant SFGH has  
 2 continuously failed and refused and continues to fail and refuse to provide Plaintiff with a reasonable  
 3 accommodation so that she can return to work. Instead, Plaintiff has been offered a series of temporary  
 4 assignments that would result in the loss of benefits, including medical benefits, provided no vacation  
 5 time or retirement contributions, to which she would be entitled to otherwise. Additionally, Defendant  
 6 SFCC has sent Plaintiff out for interviews for two separate programs for which Plaintiff learned there  
 7 was no funding. (Para. 39) Defendant SFCC has continued to frustrate the purposes of the agreement  
 8 between the parties by not offering employment to Plaintiff when it was available, by offering Plaintiff  
 9 temporary assignments and by not attempting in good faith to honor their portion of the agreement.  
 10 (Para. 40)

13 Based on the above facts, Plaintiff filed the five following causes of action against Defendant  
 14 SFCC and Ladron Durio: Breach of contract, Breach of the implied covenant of good faith and fair  
 15 dealing, Fraud, Intentional infliction of emotional distress, and negligent infliction of emotional distress.  
 16

#### 17 IV. LEGAL ARGUMENT

##### 18 A. STANDARDS APPLICABLE TO DEMURRER.

19 As this Court is all too familiar with the grounds for a demurrer, Plaintiff shall states the  
 20 following for the Court's benefit in brief:

22 Cal Code Civ Proc § 430.10 provides that the party against whom a  
 23 complaint or cross-complaint has been filed may object, by demurrer or  
 24 answer as provided in Section 430.30, to the pleading on any one or more  
 of the following grounds:

25 (b) The person who filed the pleading does not have the legal capacity to  
 26 sue.

27 ...

(e) The pleading does not state facts sufficient to constitute a cause of  
 28 action.

...

(f) The pleading is uncertain. As used in this subdivision, "uncertain" includes ambiguous and unintelligible.

A demurrer is a pleading used to *test the legal sufficiency* of other pleadings, i.e., it raises issues of law, not fact, regarding the form or content of the opposing party's pleading (complaint, answer or cross-complaint). Donabedian v. Mercury Ins. Co. (2004) 116 Cal. App. 4th 968, 994. For the purpose of testing the sufficiency of the cause of action, the demurrer admits the truth of all material facts properly pleaded. Aubry v. Tri-City Hosp. Dist. (1992) 2 Cal. 4th 962, 966-967.

Defendant SFCC is attempting to twist a fact of the pleading in order to prevent Plaintiff from bringing her causes of action against Defendant SFCC. Here, Defendant SFCC has colored the entire complaint as being one that "arises out of her employment with San Francisco City and County." However, a plain reading of the complaint will show that the action was brought as SFCC breached its promise to reinstate Plaintiff to a like position within San Francisco City and County.

**B. PLAINTIFF'S COMPLAINT IS NOT TIME BARRED AS PLAINTIFF PROPERLY COMPLIED WITH ALL APPLICABLE PROCEDURES OF THE GOVERNMENT TORT CLAIM ACT.**

Plaintiff filed a timely Government Claim with SFCC before filing her lawsuit and as such is in compliance with the California Torts Claim Act. Defendant SFCC claims that Plaintiff's complaint is now time barred. However, Defendant SFCC is incorrect in its calculation. SFCC has stated that Plaintiff is barred from any recovery for any act which occurred prior to September 20, 2005. Defendant SFCC is just plain wrong. Here, SFCC does not state the date when the breach occurred but just states that the action is barred under Government Tort Claims Act.

In making the determination as to when the applicable period is to file a Government Claim, the appropriate statute provides:

For the purpose of computing the time limits prescribed by Sections 911.2, 911.4, 912, and 945.6, the date of the accrual of a cause of action to which



1 a claim relates is the date upon which the cause of action would be  
2 deemed to have accrued within the meaning of the statute of limitations  
3 which would be applicable thereto if there were no requirement that a  
4 claim be presented to and be acted upon by the public entity before an  
5 action could be commenced thereon. Cal. Gov't. Code § 901.

6 The California Supreme Court recently examined a similar issue of when a contract is breached.  
7 In *Mullins v. Rockwell Internat. Corp.*, (1997) 15 Cal. 4th 731, the Plaintiff was employed by Defendant  
8 for over twenty years. During the period of his employment, Plaintiff was harassed and demoted.  
9 Plaintiff took a medical leave of absence from March 18, 1988, to April 24, 1988, and again from  
10 January 7, 1989, to September 20, 1989.

11 On September 19, 1991, Mullins filed a complaint against Rockwell for constructive discharge  
12 and requested damages for wrongful termination, wrongful termination based upon a breach of the  
13 covenant of good faith and fair dealing, breach of an oral employment contract.

14 Defendant sought summary judgment on the ground that all the claims alleged against it were  
15 time-barred by the applicable statute of limitations. The trial court granted Defendant's motion for  
16 summary judgment on the ground that all claims were barred by the applicable statutes of limitation.  
17 The court declared that the first cause of action was barred by the applicable one-year limitations period  
18 because Mullins announced his resignation on September 20, 1989, and did not file his complaint until  
19 September 19, 1991. The court held that the contract causes of action were barred by the two-year  
20 statute of limitations set out in Code of Civil Procedure section 339.

21 Plaintiff appealed, and the Court of Appeal affirmed. With respect to the contract causes of  
22 action, the Court of Appeal declared that the limitations period for a wrongful discharge claim begins  
23 when the employee is given notice of termination or "the basis for constructive discharge," not when  
24 termination occurs. It reasoned that the limitations period begins when the circumstances have  
25 developed such that the plaintiff is entitled to a legal remedy.



1 The California Supreme Court saw the issue differently and reversed and remanded the case.

2 The Court wrote:

3 In the context of successive breaches of a continuing contractual  
4 obligation, we have explained: "In such a contract, where the parties did  
5 not mutually abandon or rescind it upon a breach or successive breaches,  
6 the injured party could wait until the time arrived for a complete  
7 performance by the other party and then bring an action for damages for  
8 such breaches. Respondent was not bound to treat the contract as  
9 abandoned on the first breach of it, or on any particular breach, but had his  
10 election to still rely on it, and the statute of limitations could not begin to  
11 run until it had made its election." *Mullins v. Rockwell Internat. Corp.*,  
12 (1997) 15 Cal. 4th 731, 739, citing *Romano v. Rockwell Internat., Inc.*  
13 (1996) 14 Cal. 4th 479, 489-490.

14 The above passage from Mullins is completely applicable to Plaintiff's position with Defendant  
15 SFCC. Here, the City had a continuing contractual obligation to reinstate Plaintiff to a position with  
16 SFCC per the Skelly hearing. Plaintiff pleaded that Defendant SFGH failed and refused and continues  
17 to fail and refuse to provide Plaintiff with a reasonable accommodation so that she can return to work.  
18 Also that Plaintiff has been offered a series of temporary assignments that would result in the loss of  
19 benefits, including medical benefits, provided no vacation time or retirement contributions, to which she  
20 would be entitled to otherwise and SFCC sent Plaintiff out for interviews for two separate programs for  
21 which Plaintiff learned there was no funding. Defendant SFCC has continued to frustrate the purposes  
22 of the agreement between the parties by not offering employment to Plaintiff when it was available, by  
23 offering Plaintiff temporary assignments and by not attempting in good faith to honor their portion of the  
24 agreement.

25 As per the California Supreme Court wrote, Plaintiff and Defendants did not mutually rescind the  
26 agreement upon a breach or successive breaches, so Plaintiff is entitled to wait until the time arrived for  
27 a complete performance by the other party and then bring an action for damages. She was not bound to  
28

1 treat the contract as abandoned on the first breach by Defendant, but had an election to rely on it, and the  
 2 statute of limitations could not begin to run until Plaintiff made her election.

3 Plaintiff made her election on March 20, 2006 when Plaintiff filed and served a claim with SFCC  
 4 stating that SFCC breached a contract with Plaintiff for its breach of a promise to provide Plaintiff with  
 5 a new job per the agreement.  
 6

7 **C. PLAINTIFF'S COMPLAINT IS NOT TIME BARRED AS PLAINTIFF**  
 8 **PROPERLY COMPLIED WITH ALL APPLICABLE PROCEDURES OF THE**  
 9 **GOVERNMENT TORT CLAIM ACT.**

10 Plaintiff argues in the alternative that if the Court does view this action as an employment action,  
 11 then California Government Code § 905 applies. The statute provides that:

12 There shall be presented in accordance with Chapter 1 (commencing with  
 13 Section 900) and Chapter 2 (commencing with Section 910) of this part all  
 14 claims for money or damages against local public entities except:

15 ...  
 16 (c) Claims by public employees for fees, salaries, wages, mileage or other  
 17 expenses and allowances.

18 Plaintiff's lawsuit is an attempt to be put into a position she would have been if SFCC had  
 19 honored their agreement. If SFCC is found to be liable in the above action, SFCC will be ordered to  
 20 restore Plaintiff to the position she would have been, i.e. payment of all back wages.

21 Plaintiff argues in the alternative that she was not required to submit a Government Claim Form.

22 **D. THE DEMURRER TO THE BREACH OF CONTRACT CLAIM AND THE**  
 23 **BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**  
 24 **SHOULD BE OVERRULED BECAUSE PLAINTIFF'S CAUSE OF ACTION FOR**  
 25 **BREACH OF CONTRACT AND BREACH OF IMPLIED COVENANT OF**  
 26 **GOOD FAITH AND FAIR DEALING ARE INDEPENDENT OF PLAINTIFF'S**  
 27 **EMPLOYMENT TERMS AND CONDITIONS.**

28 At the Skelly hearing, SFCC entered into an oral agreement with Plaintiff to reinstate her and to  
 provide her with reasonable accommodations. Plaintiff pleaded that SFCC breached the agreement the  
 agreement by not reinstating Plaintiff to a position as agreed upon in the Skelly hearing. Here, Plaintiff  
 entered into an agreement to reinstate her to a position within SFCC.

1 Defendant SFCC insists that Plaintiff's claim must fail because a public employee cannot  
2 maintain a contract claim against a public employer. Defendant then goes on to cite several cases in an  
3 attempt to support their position.

4 In *Miller v. State of California* (1977) 18 Cal. 3d 808, Plaintiff employee sued the State of  
5 California over a new mandatory retirement age. Plaintiff attempted to argue that since he began his  
6 employment before the new law the old law was applicable to him. Plaintiff argued that he had a vested,  
7 contractual right, based on the mandatory retirement age that was in effect when he was first employed  
8 by the state, to continue in state service until age 70. The Court stated that "it is well settled in California  
9 that public employment is not held by contract but by statute and that, insofar as the duration of such  
10 employment is concerned, no employee has a vested contractual right to continue in employment  
11 beyond the time or contrary to the terms and conditions fixed by law."

12 Furthermore, the California Supreme Court again addressed this point in *Shoemaker v. Myers*  
13 (1990) 52 Cal. 3d 1. The Court cited to *Miller* and again stated

14 Plaintiff has also attempted to state a cause of action for breach of  
15 contract or breach of the implied covenant of good faith and fair dealing.  
16 However, because plaintiff is a civil service employee, he cannot state  
17 such a cause of action. "[I]t is well settled in California that public  
18 employment is not held by contract but by statute and that, insofar as the  
19 duration of such employment is concerned, no employee has a vested  
20 contractual right to continue in employment beyond the time or contrary  
21 to the terms and conditions fixed by law." *Shoemaker v. Myers* (1990) 52  
22 Cal. 3d 1, 23.

23 *Vielehr v. State of California* (1980), 104 Cal. App. 3d 392, 393 is a case that dealt with a class  
24 action surrounding a 1968 legislative enactment which affected the amount of interest paid to members  
25 of the Public Employees Retirement System (PERS) who withdraw their PERS contributions in a lump  
26 sum upon leaving public service before retirement. Plaintiff attempted to litigate the terms and  
27 conditions of their employment, primarily the interest paid out from Plaintiff's retirement account upon  
28 retirement.

In all of the cases cited, each Plaintiff was asserting that there was an existence of a contract of  
employment between each government entity and each individual Plaintiff or there was a disagreement

1 revolving around the terms and conditions of their employment. By Defendant's reasoning,  
2 Government employers can go around and enter into contracts willy-nilly without fear of any  
3 repercussion.

4  
5 Plaintiff agrees that the legislature is responsible for determining the terms and conditions of  
6 employment. There is nothing in the case law cited by Defendant SFCC that states a party is barred  
7 from bringing an action for a breach of contract that has arisen independently of Plaintiff's employment.  
8 Plaintiff is not stating that she had a vested right to continue to work for Defendant SFCC once she was  
9 reinstated. Defendant SFCC may have reinstated Plaintiff and released her immediately. However,  
10 Plaintiff does insist that Defendant SFCC had a legal obligation in the very least to have reinstated  
11 Plaintiff to a position within SFCC.

12  
13 **E. THE DEMURRER TO THE FRAUD CLAIM SHOULD NOT BE SUSTAINED**  
14 **WITHOUT LEAVE TO AMEND BECAUSE THE CITY DOES NOT HAVE**  
15 **IMMUNITY REGARDING CONTRACT CLAIMS.**

16 Defendant SFCC is attempting to escape liability under every possible theory.

17 Cal. Gov't. Code § 818.8 provides that "nothing in this part affects liability based on contract or  
18 the right to obtain relief other than money or damages against a public entity or public employee."  
19 Additionally, the Legislative Committee Comments also provide that, "The doctrine of sovereign  
20 immunity has not protected public entities in California from liability arising out of contract. This [code]  
21 section makes clear that this statute has no effect on the contractual liabilities of public entities or public  
22 employees."

23 Doctrine of governmental immunity for misrepresentation does not apply to actions sounding in  
24 contract. *Lundeen Coatings Corp. v. Department of Water & Power* (1991) 232 Cal.App.3d 16 [cited for  
25 general statement of the law]. Here, Plaintiff's cause of action is one that is based on breach of contract  
26 and breach of implied covenant of good faith and fair dealing. Defendant is now attempting to escape  
27 any form of liability and is urging the Court to toss out any valid cause of action Plaintiff. However, per  
28

1 the statute, Defendant SFCC cannot escape liability by now attempting to paint Plaintiff's claims as one  
 2 claim as opposed to the varied causes of action that Plaintiff has pleaded.

3 **F. THE DEMURRER TO THE FRAUD CLAIM SHOULD NOT BE SUSTAINED**  
 4 **WITHOUT LEAVE TO AMEND BECAUSE THE CITY DOES NOT HAVE**  
 5 **IMMUNITY REGARDING CONTRACT CLAIMS.**

6 A demurrer is not the proper forum to excuse these causes of action. Defendant SFCC offered  
 7 no legal ground for doing so. The proper forum to excuse these causes of action would be a summary  
 8 judgment.

9 **G. IN THE ALTERNATIVE, PLAINTIFF SEEKS LEAVE FROM THE COURT IN**  
 10 **ORDER TO AMEND.**

11 Cal. Code of Civ. Proc. § 472 states that:

12 Any pleading may be amended once by the party of course, and without  
 13 costs, at any time before the answer or demurrer is filed, or after demurrer  
 14 and before the trial of the issue of law thereon, by filing the same as  
 15 amended and serving a copy on the adverse party, and the time in which  
 16 the adverse party must respond thereto shall be computed from the date of  
 notice of the amendment.


17 Plaintiff intends to file an amended complaint.

18 **V. CONCLUSION**

19 Based on the above, Plaintiff respectfully requests the Court overrule the subject demurrer and  
 20 require the Defendant to answer in 10 days.

21  
 22 Dated: March 21, 2006

LADVA, SHOKER & ASSOCIATES

23   
 24  
 25 Palvir Shoker



Case No.

PROOF OF SERVICE BY MAIL

I, the undersigned, declare:

I am over the age of 18 years and am not a party to this action. I am employed in the City and County of San Francisco. My business address is 530 Jackson Street, 2<sup>nd</sup> Floor, San Francisco, California, 94133. On the date set forth below, I served the foregoing documents described as follows:

- PLAINTIFF'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO DEFENDANT CITY AND COUNTY OF SAN FRANCISCO
- Plaintiff's opposition to demurrer

On the following person(s) in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Dennis Herrera, City Attorney  
Rose-Ellen Fairgrieve  
1390 Market Street, 5<sup>th</sup> Floor  
San Francisco, CA 94102

☐ **BY FIRST CLASS MAIL:** I am readily familiar with my firm's practice for collection and processing of correspondence for mailing with the United States Postal Service, to-wit, that correspondence will be deposited with the United States Postal Service this same day in the ordinary course of business. I sealed said envelope and placed it for collection and mailing this date, following ordinary business practices.

☒ **BY PERSONAL SERVICE:** Following ordinary business practices, I cause the aforementioned document to be served, by hand delivery this date to the offices of the addressee(s).

☐ **BY OVERNIGHT MAIL:** I caused such envelope to be delivered by a commercial carrier service for overnight delivery to the office(s) of the addressee(s).

☐ **BY FACSIMILE:** I caused said document to be transmitted by Facsimile machine to the number indicated after the address(es) noted above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed this date in San Francisco, California.

Dated: 03/22/07  
SAM VERNADO

# EXHIBIT D



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 ELIZABETH S. SALVESON, State Bar #83788  
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**ENDORSED  
 FILED**  
 San Francisco County Superior Court  
 MAR 27 2007  
**GORDON PARK-LI, Clerk**  
 BY: MARY ANN MORAN  
 Deputy Clerk

Attorneys for Defendants  
 CITY AND COUNTY OF SAN FRANCISCO,  
 LADRON DURIO, AND JAMES MOORE

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 COUNTY OF SAN FRANCISCO  
 UNLIMITED JURISDICTION

GLADYS DEWITT,  
 Plaintiff,  
 vs.

CITY AND COUNTY OF SAN  
 FRANCISCO, SAN FRANCISCO  
 GENERAL HOSPITAL, LADRON  
 DURIO, JAMES MOORE, and DOES 1 –  
 25,  
 Defendants.

Case No. 459-735

**REPLY IN SUPPORT OF DEMURRER  
 TO PLAINTIFF'S COMPLAINT FOR  
 DAMAGES**

Hearing Date: April 4, 2007  
 Hearing Judge: Hon. Peter J. Busch  
 Time: 9:30 a.m.  
 Place: Dept. 301

Date Action Filed: January 19, 2007  
 Trial Date: Not yet set

Attached Documents: None

**INTRODUCTION**

Plaintiff Gladys DeWitt's opposition offers no valid basis upon which to overrule defendants' demurrer. The demurrer should be sustained without leave to amend as to DeWitt's entire complaint because DeWitt failed to file a timely government claim. Furthermore, the causes of action for breach of contract, breach of implied covenant of good faith and fair dealing, and fraud

are barred as a matter of law because DeWitt's complaint arises from her employment with the City. Finally, DeWitt's intentional and negligent infliction of emotional distress claims are barred by Workers' Compensation exclusivity.<sup>1</sup> These legal defects cannot be remedied through amendment. Accordingly, the Court should sustain the City's demurrer as to DeWitt's entire complaint without leave to amend.

## ARGUMENT

### I. DEWITT'S CONTRACT CLAIMS ARE BARRED BECAUSE THE ALLEGED CONTRACT INVOLVES THE TERMS AND CONDITIONS OF HER EMPLOYMENT.

As demonstrated in defendants' moving papers, the well-settled legal principle that the terms and conditions of public employment are set by statute and not contract (which cannot be circumvented by purported "contract" claims) is held in both California Supreme Court precedent as well as numerous California Court of Appeal decisions. The case law is unequivocal on this point. Where a public employee attempts to assert causes of action that are "predicated upon the existence of a contract of employment," it is proper to sustain a demurrer *without leave to amend*. (*Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 1435.)

DeWitt attempts to characterize her lawsuit as not arising out of the employment context so that her contract-based causes of action can survive this demurrer. But no amount of semantic gymnastics can support her argument that contract principles apply because reinstatement to her position and accommodation in that position are independent of her employment.

DeWitt alleges that the City entered into the purported contract at a Skelly hearing. A Skelly hearing, as it's commonly referred to, is a hearing that must be held when a public employer seeks to impose discipline upon an employee, to protect the employee's due process rights. *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194. DeWitt alleges that the City attempted to dismiss her, and that as a result of the hearing she was exonerated and the City was ordered to reinstate her. DeWitt states, "at the Skelly hearing, [the City] entered into an oral agreement with Plaintiff to

---

<sup>1</sup> DeWitt does not oppose the demurrer as to the fourth and fifth causes of action for intentional and negligent infliction of emotional distress.

reinstatement her and to provide her with reasonable accommodations." (Plaintiff's MPA in Opposition to Demurrer at 8; Complaint ¶42.) DeWitt argues, with no case law to support her argument, that her contract causes of action for breach of this purported contract are valid because reinstatement to her position is "independent[] of Plaintiff's employment."

There are at least two problems with DeWitt's reasoning. First, her contention that reinstatement to her job and her need to be accommodated within that job do not constitute terms and conditions of her employment belies plain language, law, and logic. There would be little point in having a civil service merit system if a public employer could enter into independent agreements with its employees about how the employer would implement its employment obligations irrespective of the civil service rules.

Second, the contract that DeWitt alleges the City entered into is invalid for lack of consideration. DeWitt gave nothing for the City's alleged promise to reinstate her and accommodate her. Accepting DeWitt's allegations as true, the City was legally required to reinstate her and to reasonably accommodate her. (See Civil Code §1605.)

Accordingly, the demurrer to DeWitt's breach of contract and breach of implied covenant of good faith and fair dealing causes of action (first and second, respectively) should be sustained without leave to amend.

**II. THE DEMURRER TO THE FRAUD CLAIM (THIRD CAUSE OF ACTION) SHOULD BE SUSTAINED WITHOUT LEAVE TO AMEND BECAUSE THE CITY HAS ABSOLUTE IMMUNITY FOR ANY ALLEGED MISREPRESENTATIONS.**

"A Public entity is not liable for any injury caused by misrepresentation by an employee of the public entity, whether or not such representation be negligent or intentional." (Gov't Code §818.8.) The immunities set forth in Government Code Section 818.8 apply in cases where financial interests are at stake. (*Johnson v. State of California* (1968) 69 Cal.2d 782, 800.) Where the public entity is alleged to have engaged in willful misrepresentation regarding the terms of employment, financial interests are at stake. (*Burden v. County of Santa Clara* (2000) 81 Cal.App.4<sup>th</sup> 244, 250.)

Section 818.8 is quoted in its entirety above. DeWitt cites to language that does not exist in that section. Accordingly, the Court should not read any limitation into the language of the statute, as DeWitt urges.

Furthermore, DeWitt's argument that her fraud claim is not barred is based upon her contention that she has a valid contract claim. As explained above, DeWitt does not have a valid contract claim.

The Court should sustain the demurrer without leave to amend as to DeWitt's third cause of action.

**III. DEWITT'S ACTION IS TIME-BARRED BECAUSE SHE FILED HER TORT CLAIM MORE THAN SIX MONTHS AFTER HER CLAIM ACCRUED, AND DID NOT SEEK LATE CLAIM RELIEF.**

DeWitt's complaint is barred because she did not file a timely government claim to the City before filing her lawsuit, as required by the California Tort Claims Act. (See Gov't Code §§ 905, 911.2.) A plaintiff must file a California tort claim within six months or, in the event of late claim relief, within one year of the date the injury incurred as a result of defendant's wrongful act or omission. (Govt. Code §911.2, § 911.4.)

DeWitt does not present any argument that her tort claim regarding her third, fourth, or fifth causes of action was timely filed. The Court should sustain the demurrer without leave to amend as to those causes of action because she failed to comply with the Tort Claims Act.<sup>2</sup>

**IV. THE DEMURRER TO THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM (FOURTH CAUSE OF ACTION) AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CLAIM (FIFTH CAUSE OF ACTION) SHOULD BE SUSTAINED WITHOUT LEAVE TO AMEND BECAUSE THE CLAIMS ARE PRECLUDED BY THE WORKERS' COMPENSATION ACT.**

DeWitt offers no opposition to the City's argument that the exclusive remedy provisions of the workers' compensation laws bar her fourth and fifth causes of action. The demurrer should be sustained without leave to amend as to these causes of action because DeWitt's claims are barred as a matter of law.

<sup>2</sup>DeWitt's argument that her tort claim was timely as to her first and second causes of action relies on her argument that she can validly state contract claims.

Furthermore, as these are the only causes of action alleged against Defendant Ladron Durio, dismissal of these causes of action mandates dismissal of Defendant Durio as well.

V. THE DEMURRER SHOULD BE SUSTAINED AS TO DEFENDANT SAN FRANCISCO GENERAL HOSPITAL BECAUSE THE HOSPITAL IS NOT A LEGAL ENTITY.

DeWitt offers no argument that San Francisco General Hospital is a proper defendant. The Court should dismiss the Hospital.

VI. THE COURT SHOULD NOT GRANT LEAVE TO AMEND.

Although DeWitt states that she intends to file an amended complaint, she does not state what amendments she would make. Thus, she has failed to meet her burden of showing a reasonable possibility that she can cure the defects in her complaint. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

### CONCLUSION

For the foregoing reasons, DeWitt's complaint fails as a matter of law. Accordingly, the Court should sustain the demurrer without leave to amend. Even if the Court does not sustain the City's demurrer in its entirety, defendants Ladron Durio and San Francisco General Hospital should be dismissed with prejudice.

Dated: March 27, 2007

DENNIS J. HERRERA  
City Attorney  
ELIZABETH S. SALVESON  
Chief Labor Attorney  
ROSE-ELLEN H. FAIRGRIEVE  
Deputy City Attorney

By:   
ROSE-ELLEN H. FAIRGRIEVE

Attorneys for Defendants  
CITY AND COUNTY OF SAN FRANCISCO,  
LADRON DURIO, AND JAMES MOORE



PROOF OF SERVICE

I, Karen Passanisi, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Fifth Floor, San Francisco, CA 94102.

On March 27, 2007, I served the following document(s):

- **REPLY IN SUPPORT OF DEMURRER TO PLAINTIFF'S COMPLAINT FOR DAMAGES**

on the following persons at the locations specified:

Ashwin Ladva, Esq.  
Ladva, Shoker & Associates  
530 Jackson St., 2<sup>nd</sup> Floor  
San Francisco, CA 94133-5143

in the manner indicated below:

☒ **BY UNITED STATES MAIL:** Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

☐ **BY PERSONAL SERVICE:** I sealed true and correct copies of the above documents in addressed envelope(s) and caused such envelope(s) to be delivered by hand at the above locations by a professional messenger service. A declaration from the messenger who made the delivery ☐ is attached or ☐ will be filed separately with the court.

☐ **BY OVERNIGHT DELIVERY:** I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and delivery by overnight courier service. I am readily familiar with the practices of the San Francisco City Attorney's Office for sending overnight deliveries. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be collected by a courier the same day.

☒ **BY FACSIMILE:** Based on a written agreement of the parties to accept service by fax, I transmitted true and correct copies of the above document(s) via a facsimile machine at telephone number (415) 554-4248 to the persons and the fax numbers listed above. The fax transmission was reported as complete and without error. The transmission report was properly issued by the transmitting facsimile machine, and a copy of the transmission report ☐ is attached or ☒ will be filed separately with the court.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed March 27, 2007, at San Francisco, California.

  
Karen Passanisi

ENDORSED  
FILED  
San Francisco County Superior Court

APR 04 2007

GORDON PARK-H, Clerk  
BY: WESLEY RAMIREZ  
Deputy Clerk

DENNIS J. HERRERA, State Bar #139669  
City Attorney  
ELIZABETH S. SALVESON, State Bar #83788  
Chief Labor Attorney  
ROSE-ELLEN H. FAIRGRIEVE, State Bar #181257  
Deputy City Attorney  
Fox Plaza  
1390 Market Street, 5<sup>th</sup> Floor  
San Francisco, California 94102-5408  
Telephone: (415) 554-3845  
Facsimile: (415) 554-4248  
E-Mail: rose-ellen.fairgrieve@sfgov.org

Attorneys for Defendants  
CITY AND COUNTY OF SAN FRANCISCO,  
LADRON DURIO, AND JAMES MOORE

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN FRANCISCO  
UNLIMITED JURISDICTION

GLADYS DEWITT,

Plaintiff,

vs.

CITY AND COUNTY OF SAN  
FRANCISCO, SAN FRANCISCO  
GENERAL HOSPITAL, LADRON  
DURIO, JAMES MOORE, and DOES 1 -  
25,

Defendants.

Case No. 459-735

REQUEST FOR JUDICIAL NOTICE  
IN SUPPORT OF DEMURRER TO  
PLAINTIFF'S COMPLAINT

Hearing Date:	April 4, 2007
Hearing Judge:	Hon. Peter J. Busch
Time:	9:30 a.m.
Place:	Dept. 301
Date Action Filed:	January 19, 2007
Trial Date:	Not yet set



1  
2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 NOTICE IS HEREBY GIVEN that the City and County of San Francisco and Ladron  
4 Durio will and hereby do request that this Court take judicial notice of the following document  
5 pursuant to California Evidence Code Section 452(h).

6 Plaintiff Gladys DeWitt's Claim Against the City and County of San Francisco, filed  
7 March 20, 2006, attached hereto as Exhibit A.

8  
9  
10 Dated: April 3 2007

11 DENNIS J. HERRERA  
12 City Attorney  
13 ELIZABETH S. SALVESON  
14 Chief Labor Attorney  
15 ROSE-ELLEN H. FAIRGRIEVE  
16 Deputy City Attorney

17 By:   
18 ROSE-ELLEN H. FAIRGRIEVE

19 Attorneys for Defendants  
20 CITY AND COUNTY OF SAN FRANCISCO,  
21 LADRON DURIO AND JAMES MOORE  
22  
23  
24  
25  
26  
27  
28

EXHIBIT A

DPHGH

0602346

# CLAIM AGAINST THE CITY AND COUNTY OF SAN FRANCISCO

On completing this form, please read the instructions on the back. You have only 6 months from the date of incident to submit this form and supporting documentation to the Controller or the Clerk of the Board of Supervisors.

Claimant's Name and Home Address (Please Print Clearly)  
Gladys Dewitt  
772 HAMPDEN ST  
 City San Francisco, CA Zip 94110  
 Telephone (415) 695-0470

2. Send Official Notices and Correspondence to:

Gladys Dewitt  
772 HAMPDEN ST  
 City San Francisco Zip 94110  
 Telephone Daytime 695-0470

Date of Birth

9/20/50

4. Social Security Number

567-80-6441

5. Date of Incident

APRIL - JAN 28<sup>TH</sup> 06

6. Time of Incident (AM or PM)

APRIL - 12:00 AM

Location of Incident or Accident SFGH

1001 POTRERO BLVD SF CA 94100

8. Claimant Vehicle License Plate #, Type and Year

Basis of Claim. State in detail all facts and circumstances of the incident. Identify all persons, entities, property and City departments involved. State why you believe the City is responsible for the alleged injury, property damage or loss.

WAS REMOVED FROM JOB JAN 2001 - REPLACED VIA ARBITRATION  
IN 03 CITY EMPLOYED - WAS OFFERED JOB JAN 06  
BY ROBERT THOMPSON PERSONNEL DIRECTOR S.F.C.H. & NEVER  
RECEIVED NEW JOB.

Name, I.D. Number and City Department of City Employee who allegedly caused injury or loss

ROBERT THOMPSON

Type of City Vehicle

Vehicle License Number and Bus or Train Number

10. Description of Claimant's injury, property damage or loss

LOSS REMOVAL FROM JOB  
HEALTH WORKER II - Classification  
# 2586

REFERENCE - City & County D.P.H.  
INSURANCE # GDS-55

11. Amount of Claimant's property damage or loss and method of computation. Attach supporting documentation. (See Instructions)

ITEMS

LOSS & WAGES \$ 189,000  
REIMBURSEMENT \$ 189,000  
OTHER \$ 0  
TOTAL AMOUNT \$ 189,000

Court Jurisdiction: Limited Civil ☐ Unlimited Civil ☒

12. Witnesses (if any) Name

Address

Telephone

1. Julian Hubbard

600 ALYCEAN ST

650-369-8253

2. Robert Thompson

1001 POTRERO BLVD S.F.

915-206-8000

13.

Signature of Claimant or Representative

3-16-06  
 Date

Print Name GLADYS DEWITT

Relationship to Claimant

Do Not Write In This Space

RECEIVED  
 SAN FRANCISCO  
 CITY & COUNTY OF

06 MAR 20 PM 2:30

CAFORM 2 2001

DENNIS J. HERRERA, State Bar 139669  
City Attorney  
ELIZABETH S. SALVESON, State Bar #83788  
Chief Labor Attorney  
ROSE-ELLEN H. FAIRGRIEVE, State Bar #181257  
Deputy City Attorney  
Fox Plaza  
1390 Market Street, 5<sup>th</sup> Floor  
San Francisco, California 94102-5408  
Telephone: (415) 554-3845  
Facsimile: (415) 554-4248  
E-Mail: rose-ellen.fairgrieve@sfgov.org

Attorneys for Defendants  
CITY AND COUNTY OF SAN FRANCISCO,  
LADRON DURIO, AND JAMES MOORE

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN FRANCISCO  
UNLIMITED JURISDICTION

GLADYS DEWITT,

Plaintiff,

vs.

CITY AND COUNTY OF SAN  
FRANCISCO, SAN FRANCISCO  
GENERAL HOSPITAL, LADRON  
DURIO, JAMES MOORE, and DOES 1 –  
25,

Defendants.

Case No. 459-735

**PROOF OF SERVICE**

I, Karen Passanisi, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Fifth Floor, San Francisco, CA 94102.

On April 5, 2007, I served the attached:

- **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEMURRER TO PLAINTIFF'S COMPLAINT**

ENDORSED  
FILED  
San Francisco County Superior Court

APR 05 2007

GORDON PARK-LI, Clerk  
BY: WESLEY CHANDLER  
Deputy Clerk

1 on the interested parties in said action, by placing a true copy thereof in sealed envelope(s)  
2 addressed as follows:


3 Ashwin Ladva, Esq.  
4 Ladva, Shoker & Associates  
5 530 Jackson St., 2<sup>nd</sup> Floor  
6 San Francisco, CA 94133-5143

7 and served the named document in the manner indicated below:

8 ☒ **BY UNITED STATES MAIL:** Following ordinary business practices, I sealed true and correct copies  
9 of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing  
10 with the United States Postal Service. I am readily familiar with the practices of the San Francisco City  
11 Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s)  
12 that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that  
13 same day.

14 I declare under penalty of perjury under the laws of the State of California that the foregoing  
15 is true and correct.

16 Executed April 5, 2007, at San Francisco, California.

17   
18 \_\_\_\_\_  
19 Karen Passanisi  
20  
21  
22  
23  
24  
25  
26  
27  
28

# EXHIBIT E



DENNIS J. HERRERA, State Bar #139669  
City Attorney  
ELIZABETH S. SALVESON, State Bar #83788  
Chief Labor Attorney  
ROSE-ELLEN H. FAIRGRIEVE, State Bar #181257  
Deputy City Attorney  
Fox Plaza  
1390 Market Street, 5<sup>th</sup> Floor  
San Francisco, California 94102-5408  
Telephone: (415) 554-3845  
Facsimile: (415) 554-4248  
E-Mail: rose-ellen.fairgrieve@sfgov.org

Attorneys for Defendants  
CITY AND COUNTY OF SAN FRANCISCO,  
LADRON DURIO, AND JAMES MOORE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

GLADYS DEWITT,

Plaintiff,

vs.

CITY AND COUNTY OF SAN  
FRANCISCO, SAN FRANCISCO  
GENERAL HOSPITAL, LADRON  
DURIO, JAMES MOORE, and DOES 1 -  
25,

Defendants.

Case No. 459-735

~~PROPOSED~~ ORDER SUSTAINING  
DEFENDANT CITY AND COUNTY OF  
SAN FRANCISCO AND LADRON  
DURIO'S DEMURRER TO  
PLAINTIFF'S COMPLAINT

Hearing Date: April 11, 2007  
Hearing Judge: Hon. Patrick J. Mahoney  
Time: 9:30 a.m.  
Place: Dept. 302

Date Action Filed: January 19, 2007  
Trial Date: Not yet set

ENDORSED  
FILED

San Francisco County Superior Court

APR 25 2007

GORDON PARK-LI, Clerk  
BY: LINDA K. ESPY  
Deputy Clerk

1 This matter came on regularly for hearing on April 11, 2007, in Department 302, the  
2 Honorable Patrick J. Mahoney presiding. Present during the hearing and representing defendants  
3 City and County of San Francisco and Ladron Durio ("City") was Deputy City Attorney Rose-  
4 Ellen H. Fairgrieve. Plaintiff Gladys DeWitt was represented by her attorney, Ashwin Ladva,  
5 Esq. After considering the pleadings, oral argument, and matters judicially noticeable,  
6 **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, THAT:**

7 The Defendants' demurrer to Plaintiff's January 19, 2007 Complaint is sustained without  
8 leave to amend as to the First and Second causes of action, and is sustained as to the Third,  
9 Fourth, and Fifth causes of action, with leave to amend as against all Defendants except San  
10 Francisco General Hospital.

11 **In so ordering, the Court finds that:**

12 1) The Complaint is barred on its face by Government Code Sections 911.2 and 911.4.  
13 Pursuant to those Sections, a plaintiff must file a California tort claim within six months or, in  
14 the event of late claim relief, within one year of the date the injury incurred as a result of  
15 defendant's wrongful act or omission.

16 2) Plaintiff filed her tort claim on March 20, 2006. Plaintiff does not allege any facts that  
17 give rise to her causes of action that occurred after September 20, 2005, six months before she  
18 filed her claim. Accordingly, Plaintiff's tort claim was untimely.

19 3) The first and second causes of action for breach of contract and breach of implied  
20 covenant of good faith and fair dealing fail as a matter of law because a public servant may not,  
21 as a matter of law, assert contract or quasi-contract claims. (*Kemmerer v. County of Fresno*  
22 (1988) 200 Cal.App.3d 1426, 1432-35.)

23 4) The third cause of action for fraud against the City fails because the City is immune from  
24 liability for misrepresentation under California Government Code Section 818.8. (*Burden v.*  
25 *County of Santa Clara* (2000) 81 Cal.App.4<sup>th</sup> 244, 250.)

26 5) The fourth and fifth causes of action for intentional infliction of emotional distress and  
27 negligent infliction of emotional distress fail because they are barred by Workers' Compensation  
28 Act exclusivity.

6) Generally, an employee whose injury arises out of and in the course of employment is limited to recovery of workers' compensation benefits. (Labor Code §§ 3600-3602.) "Section 3600 of the Labor Code provides that an employer is liable for injuries to its employees arising out of and in the course of employment, and section [3602] declares that where the conditions of workers' compensation exist, the right to recover such compensation is the exclusive remedy against an employer for injury or death of an employee." (*Vuillemainroy v. American Rock & Asphalt, Inc.* (1999) 70 Cal.App.4<sup>th</sup> 1280, 1283.) These provisions apply to all injuries that arise from the employment relationship. (*Livitsanos v. Superior Court* (1992) 2 Cal.4<sup>th</sup> 744, 747.)

7) Where, as here, "the complaint affirmatively alleges facts indicating coverage by the workers' compensation laws, if it fails to state additional facts negating application of the exclusive remedy provision, no civil action will lie and the complaint is subject to a general demurrer." (*Halliman v. Los Angeles Unified School Dist.* (1984) 163 Cal.App.3d 46, 50.)

8) Plaintiff's allegations arise out of and in the course of employment, and thus her fourth and fifth causes of action are barred as a matter of law under Workers' Compensation exclusivity.

**IT IS SO ORDERED.**

Dated: APR 24 2007

**PATRICK J. MAHONEY**

Honorable Patrick J. Mahoney  
San Francisco Superior Court

Approved as to form.

Ashwin Ladva, Esq.

Dated

PROOF OF SERVICE

I, Karen Passanisi, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Fifth Floor, San Francisco, CA 94102.

On April 26, 2007, I served the following document(s):

- **ORDER SUSTAINING DEFENDANT CITY AND COUNTY OF SAN FRANCISCO AND LADRON DURION'S DEMURRER TO PLAINTIFF'S COMPLAINT**

on the following persons at the locations specified:

Ashwin Ladva, Esq.  
Ladva, Shoker & Associates  
530 Jackson St., 2<sup>nd</sup> Floor  
San Francisco, CA 94133-5143

in the manner indicated below:

☐ **BY UNITED STATES MAIL:** Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.


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☐ **BY OVERNIGHT DELIVERY:** I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and delivery by overnight courier service. I am readily familiar with the practices of the San Francisco City Attorney's Office for sending overnight deliveries. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be collected by a courier the same day.

☐ **BY FACSIMILE:** Based on a written agreement of the parties to accept service by fax, I transmitted true and correct copies of the above document(s) via a facsimile machine at telephone number (415) 554-4248 to the persons and the fax numbers listed above. The fax transmission was reported as complete and without error. The transmission report ☐ is attached or ☒ will be filed separately with the court.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed April 26, 2007, at San Francisco, California.

  
\_\_\_\_\_  
Karen Passanisi